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No. 82-871

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

A. H. ROBINS COMPANY, INCORPORATED,
Petitioner,

v.

JANICE ABED, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

*THOMAS J. BRANDI
Attorney of Record
*C. DELOS PUTZ, JR.
Of Counsel
BIANCO, BRANDI & JONES
240 Stockton Street
San Francisco, CA 94109
(415) 362-6100

BRADLEY POST
POST, SYRIOS & BRADSHAW
204 Occidental Plaza
300 North Main
Wichita, Kansas 67202
(316) 267-6391
Attorneys For Respondents

* Member of the Bar of the United States Supreme Court

QUESTION PRESENTED

Did the Ninth Circuit act properly in vacating a nationwide class certified under Fed.R.Civ.P. 23(b)(1)(B) consisting of all persons who have asserted punitive damage claims under the laws of the several states for personal injuries caused by an intrauterine device known as the Dalkon Shield, where there was no showing of the likely insolvency of the defendant?

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BRIEF IN OPPOSITION

Respondents are plaintiffs in the products liability litigation presently pending in the Northern District of California under the title *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation.*[1] Respondents request that

[1] Thomas J. Brandi was designated by agreement among counsel for plaintiffs in the Dalkon Shield litigation in the Northern District of California to act as coordinating counsel for the California plaintiffs in the appeal of the class certification issue to the Ninth Circuit Court of Appeals, and in opposing the present petition for certiorari. By agreement of counsel, this brief is filed on behalf of those plaintiffs, and on behalf of the non-resident plaintiffs who would be affected by certification of a nationwide class action as to punitive damages in the Dalkon Shield cases. Bradley Post is lead and liaison counsel for plaintiffs in the Multi-District Litigation Docket No. 211 (MDL-211) pending in the United States District Court for the District of Kansas under the title *In re A. H. Robins Co., Inc., "Dalkon Shield IUD Products Liability Litigation.*

this Court deny the petition of A. H. Robins Co., Inc., for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Respondents are representatives of some 1500 women nationwide who have asserted claims for punitive damages against A.H. Robins Co., manufacturer of an intrauterine device known as the "Dalkon Shield", for injuries caused by use of the Dalkon Shield. The claims asserted by these plaintiffs arise under state law, and are pending in state and federal courts in at least 46 states. About 165 cases are pending before Judge Spencer Williams in the United States District Court for the Northern District of California. In June, 1981, Judge Williams, on his own motion and over the objection of plaintiffs,[2] undertook to dispose of the punitive damage issue in its entirety by certifying a nationwide class, under Fed.R.Civ.P. 23(b)(1)(B), consisting of all persons who have asserted punitive damage claims against Robins. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 521 F.Supp. 1188 (N.D. Cal. 1981). Defendant Robins concurred in the certification of a nationwide class as to punitive damages and, on November 5, 1981, Judge Williams entered a Memorandum Of Opinion And Order, elaborating the basis for certification of the nationwide class. *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation,* 526 F.Supp. 887 (N.D. Cal. 1981).

The district court certified the punitive damage claims as a "limited fund" class action under Rule 23(b)(1)(B). In so doing, the judge relied on an affidavit from one of Robins' attorneys, showing claims for compensatory damages in excess of $500 million and punitive damage claims in excess of $2.3

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[2] All but one of California plaintiffs' counsel opposed class certification. Out-of-state plaintiffs were not notified of the district court's intent to certify a class including them, and did not participate in the status conferences held to discuss the class action proposal. Plaintiffs from California, Oregon, Ohio, Florida and Kansas joined in motions to decertify the punitive damages class. Pet. App. at 3 and 5.

billion and a claimed net worth of A. H. Robins Co. of $280,394,000 as of December 31, 1980. The district court did not allow plaintiffs to conduct discovery as to Robins' net worth, earnings, insurance coverage, or amounts paid in settlement of some 3,000 claims and suits already disposed of. (Pet. App. at 4 and 9.) However, Robins admits that only three punitive damage awards have been returned against it, one for $75,000, one for $6,200,000, and one for $500,000. Only the $75,000 award has been paid. The other two awards are on appeal (Pet. 4 at n.5).

The district court designated lead counsel for the nationwide class, but he resigned. None of the attorneys already involved in the case is willing to serve as class counsel. (Pet. App. 7.)

The district court also conditionally certified a California statewide class under Rule 23(b)(3) limited to the issue of Robins' liability arising from the manufacture and sale of the Dalkon Shield (Pet. App. 5).

On November 5, 1981, the district court certified the issue of certification of both classes for interlocutory appeal to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1292(b) (Pet. App. at 23, 80). On June 18, 1982, a panel of the Ninth Circuit reversed the district court's certification of the nationwide punitive damage class under Rule 23(b)(1)(B) and the California-wide liability class under Rule 23(b)(3) (Pet. App.1).

The Ninth Circuit held that the California liability class did not satisfy the commonality requirement of Rule 23(a)(3) or the requirement of Rule 23(b)(3) that the class action be superior to other available means of adjudication.

As to the nationwide punitive damage class, the Ninth Circuit held that the district court erred in certifying it as a "limited fund" class under Rule 23(b)(1)(B) "without establishing as a fact that Robins' assets were too limited to permit

conventional litigation" (Pet. App. 21). In addition, the Ninth Circuit held that even if the requirements of Rule 23(b)(1)(B) were met, "the case would still fail to meet Rule 23(a)'s preliminary requirements of commonality, typicality and adequacy of representation."

Robins' petition for rehearing *en banc* was denied on August 26, 1982. Robins' petition for certiorari does not seek review of the Ninth Circuit's rejection of the California-wide liability class under Rule 23(b)(3), but only of the nationwide punitive damage class under Rule 23(b)(1)(B).

REASONS FOR DENYING THE WRIT

I

There is no conflict in decisions. The lower federal courts have uniformly held that the mere mathematical possibility of a defendant's insolvency from potential damage awards does not create a "limited fund" which will support class certification under Fed.R.Civ.P. 23(b)(1)(B).

The district court failed to find that insolvency of defendant Robins was anything more than a theoretical possibility due to the fact that the claims asserted against it exceeded its net worth. Robins itself has never contended that insolvency is a practical threat of any kind, and the district court refused to permit discovery as to the likelihood of Robins' insolvency. The Ninth Circuit's holding that it was improper to certify a "limited fund" class action under Rule 23(b)(1)(B) without a clear evidentiary showing of actual likelihood of insolvency is in accord with all of the federal court decisions on this issue. In *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 389 (D.Mass. 1979), class certification under Rule 23(b)(1)(B) was refused on the basis that "the plaintiffs do not, however, offer evidence of the likely insolvency of the defendants, and I do not believe that, without more, numerous plaintiffs and a large *ad damnum* clause should guarantee (b)(1)(B) certification." *Accord*, *McElhaney* v. *Eli Lilly & Co.*, 93 F.R.D. 875, 879 (D.S.D. 1982) (certification of a "limited fund" class in a DES case

denied because there was no showing "that defendants would be unable to satisfy judgments in separate actions for damages . . . if and when any such judgments are entered.")

Similarly, *In re "Agent Orange" Products Liability Litigation*, 506 F.R.D. 762, 789 (E.D.N.Y. 1980) the court denied (b)(1)(B) certification, stating that "However large the potential damages may appear here, plaintiffs offer no evidence of the likely insolvency of defendants . . . ."

Most recently, this Court denied certiorari in *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied sub nom. Stover* v. *Rau*, 51 U.S.L.W. 3355 (Nov. 9, 1982). The district court had certified a "limited fund" class action as to the punitive damage claims in the Kansas City Hyatt Hotel disaster. The Eighth Circuit vacated the certification order as a violation of the Anti-Injunction Act without reaching the merits of the certification. In so doing, the court considered whether unliquidated and contested damage claims in excess of the assets and insurance of a defendant created a "limited fund," and concluded that it did not.

> In the present case, the class has an uncertain claim for punitive damages against defendants who have not conceded liability. The claim does not qualify as a limited fund . . . . 680 F.2d at 1182.

Coburn v. *4-R Corp.*, 77 F.R.D. 43 (E.D.Ky. 1977), *mandamus refused sub nom. Union Light, Heat & Power Co.* v. *United States District Court*, 588 F.2d 543 (6th Cir. 1978), *appeal dismissed*, 443 U.S. 913 (1979) is not to the contrary. The district court found a likelihood of insolvency where there were 164 wrongful death claims, stemming from a disastrous restaurant fire, and the main defendant had assets of only $3 million.

The Ninth Circuit's refusal to permit certification of a "limited fund" class on the basis of a purely theoretical possibility of insolvency is in accord with all of the decisions applying Rule 23(b)(1)(B).

II

The Ninth Circuit properly found that the district court abused its discretion by certifying a "limited fund" class action without sufficient evidence or even an adequate preliminary inquiry as to the likelihood of defendant's insolvency.

The petition is premature. The Ninth Circuit vacated certification of a nationwide class as to punitive damages under Rule 23(b)(1)(B) because of a clear abuse of discretion by the district court; namely, that the district court ordered certification without conducting a preliminary fact-finding inquiry and without permitting discovery on the issue of the likelihood of Robins' insolvency.

Moreover, denial of class certification is an interlocutory ruling which will not be reviewed by this Court in the absence of some exceptional circumstance. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

III

Rule 23 is not an appropriate vehicle for fashioning a national law of products liability.

Petitoner is asking this Court to fashion a national law of products liability. Congress has not yet seen fit to create a federal law with respect to the compensatory or punitive damage aspects of personal injury claims arising from the use of nationally distributed products. Such claims are left to adjudication under state law. *Cf. In re "Agent Orange" Products Liability Litigation*, 635 F.2d 987 2d Cir. 1980), *cert. denied sub nom. Chapman* v. *Dow Chemical Co.*, 102 S.Ct. 980 (1981) (holding that the claims of Vietnam veterans against the manufacturers of "Agent Orange" arose under state law and refusing to find a federal cause of action). The federal courts are without power to create a national law of products liability, or of punitive damages relating to products liability. If such a law is needed, "it is up to Congress and not the courts, to create

the needed uniform law." *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 633 (7th Cir.), *cert. denied*, 102 S.Ct. 358 (1981).

IV

Certification of a nationwide class of personal injury claimants having no contact with California violates due process.

The Ninth Circuit decertified the nationwide punitive damage class for failure to meet the requirements of Fed.R.Civ.P. 23, without reaching the very substantial Constitutional objections to such a class. There is no authority which would support the exercise of jurisdiction by a California federal court, sitting in diversity, over a nationwide class of personal injury plaintiffs having no contacts, ties or connections whatever with California. There is no nexus of jurisdiction such as a common fund within the forum state,[3] or a federal statute authorizing nationwide jurisdiction,[4] nor are the plaintiff class members asserting a claim based on a tort which occurred within the forum state.[5] The non-resident plaintiffs have objected to the exercise of jurisdiction over them, and California has no special interest in the litigation.[6]

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[3] *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

[4] E.g., *In re Gap Securities Litigation*, 79 F.R.D. 283 (N.D.Cal. 1978).

[5] E.g., *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied* 51 U.S.L.W. 355 (November 9, 1981).

[6] Respondents' arguments against exercise of jurisdiction over a nationwide plaintiff class were set forth more fully in the amicus brief filed on their behalf in this Court in *The Gillette Co.* v. *Miner*, No. 81-1493, writ of certiorari dismissed for want of jurisdiction, 51 U.S.L.W. 4013 (Dec. 7, 1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS J. BRANDI

THOMAS J. BRANDI
Attorney of Record
C. DELOS PUTZ, JR.,
Of Counsel
BIANCO, BRANDI & JONES
240 Stockton Street
San Francisco, CA 94109
(415) 362-6100

BRADLEY POST
POST, SYRIOS & BRADSHAW
204 Occidental Plaza
300 North Main
Wichita, Kansas 67202
(316) 267-6391

Attorneys for Respondents

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